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In the Supreme Court of the United States

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MARIA AGUILAR, ET AL., PETITIONERS

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A) and the orders of the district court (Pet. Apps. C, D) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A 1a-2a) was entered on April 15, 1977. A petition for rehearing was denied on May 18, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on August 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly dismissed as moot petitioners' civil action seeking declaratory and injunctive relief to prevent their transfer from a co-correctional Federal Youth Corrections Act facility and its conversion to an all-male facility.

STATEMENT

On May 12, 1975, petitioners, who were then inmates of the Robert F. Kennedy Youth Center at Morgantown, West Virginia, filed the instant action in the United States District Court for the District of Columbia against the Attorney General, the Director and Regional Director of the Bureau of Prisons, and the warden of the center (Pet. 5). Petitioners contended that the conversion of the center to an all-male institution, and their transfer to institutions housing adults, would violate the Federal Youth Corrections Act (18 U.S.C. 5005, *et seq.*), the Administrative Procedure Act (5 U.S.C. 551, 553) and the Fifth Amendment (Pet. 5-6). They sought a declaration of the illegality of the proposed action and an injunction prohibiting (1) their transfer to another institution without a prior hearing, (2) conversion of the Kennedy Center to an all-male institution, or (3) any commingling of adult and youth offenders by the Bureau of Prisons.[1]

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[1]The determination to discontinue the Kennedy Youth Center as a co-correctional facility (*i.e.*, one with both male and female prisoners) was based upon two factors. First, because of the extreme disproportion between the number of male and female youth offenders, the male facilities (including the male wing of Kennedy) were operating over capacity, while the female wing of Kennedy was operating substantially under capacity. Second, the co-correctional concept did not work well in practice at Kennedy, primarily because the physical design of the center made adequate supervison to prevent unauthorized sexual encounters between male and female inmates extremely difficult (Joint Appendix ("J.A.") filed in the court of appeals, pp. 101-105).

On June 26, 1975, petitioners moved to amend their complaint to make it a class action representing "all female individuals who are now or will be sentenced under the Federal Youth Corrections Act and committed for treatment to the custody of" the Attorney General and the Director of the Bureau of Prisons, and also moved to certify the class (Pet. 6).

At a hearing on June 27, 1975, on petitioners' motion for a preliminary injunction, the parties, under the guidance of the district court, concluded a series of agreements whereby petitioners Horton and Ogletree were conditionally released as of June 30 and petitioner Jackson was given a medical furlough to her home in Washington, D.C., for the purpose of a kidney transplant donation to her sister (Tr. 12-13).[2] After the hearing the parties also agreed that petitioner Aguilar would be transferred to a community treatment center near her home in New Jersey. Petitioners Jackson and Aguilar were conditionally released on August 1 and August 15, 1975, respectively.

On August 22, 1975, respondents filed an opposition to petitioners' motions to amend their complaint and proceed as a class action; they also moved to dismiss the action on grounds of mootness. The district court granted respondents' motion to dismiss and denied petitioners' motions on January 9, 1976 (Pet. App. C), and it subsequently reaffirmed its ruling (Pet. App. D). The court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Petitioners' suit was properly dismissed as moot. When, as a result of a defendant's voluntary action, a plaintiff is no longer subject to allegedly illegal conduct, and the plaintiff has no reasonable expectation that

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[2]"Tr." refers to the transcript of the June 27 hearing.

he or she will thereafter be subject to the conduct complained of, the claim lacks the necessary immediacy and reality to warrant declaratory relief and is therefore moot. *Preiser* v. *Newkirk*, 422 U.S. 395, 402-403; see *Weinstein* v. *Bradford*, 423 U.S. 147, 148-149. The same standard applies to a claim for injunctive relief, which is moot if there is " 'no reasonable expectation that the wrong will be repeated.' " *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633. Moreover, even if a claim for injunctive relief is not technically moot, relief will be denied unless the plaintiff can show "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive"; and the determination of the trier of fact regarding the likelihood of future violations must be upheld absent "a strong showing of abuse" and "no reasonable basis" for the refusal. *Id.* at 633-634.

Petitioners have made no such showing here. They sought declaratory and injunctive relief to prevent their transfer to institutions housing adult inmates, and their conditional releases achieved this objective and rendered the case moot. Contrary to petitioners' assertions (Pet. 12-13), they have " 'no reasonable expectation that the wrong will be repeated.' " See *United States* v. *W.T. Grant Co., supra*, 345 U.S. at 633. The possibility that petitioners will be returned to custody pursuant to the Federal Youth Corrections Act, and then be subjected to imprisonment with adults, is, at most, remote and speculative at this time.[3]

Accordingly, the district court correctly dismissed the suit, finding it "unlikely that the named plaintiffs will in the future be subject to the challenged decisions and actions of the defendants" (Pet. App. C 6a; see also Pet. App. D 10a).

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[3]Contrary to petitioners' contentions (Pet. 12-13), the situation is not significantly different as regards petitioner Ogletree. After her release and the dismissal of this case she was convicted on state charges for which she received a five-year sentence, and a federal detainer was filed with the State. Ogletree's Federal Youth Corrections Act sentence—and hence the detainer—expires on August 23, 1979, well before the end of her five-year state sentence. Even if she were to be paroled while the detainer remained in force, her conditional release would not necessarily be revoked, nor would she necessarily be assigned to an adult institution.

2. Petitioners also contend (Pet. 14-16) that even if their individual claims are moot, there is still a live controversy between respondents and the class petitioners seek to represent. They contend that the dismissal of their action conflicts with both this Court's decision in *Sosna* v. *Iowa*, 419 U.S. 393, and with the decisions of various courts of appeals applying *Sosna* (Pet. 14 and n. 19). In *Sosna* the Court held that a class challenge to a one-year residency requirement could still present a live controversy as to the remainder of the certified class represented by the named plaintiff although her individual case had become moot before the conclusion of appellate review.

The Court expressly emphasized that this principle applies where (1) there is a live case or controversy both at the time the complaint is filed and at the time the class is certified, and (2) "the alleged harm would * * * dissipate during the normal time required for resolution of the controversy * * *." 419 U.S. at 402. Here, however, the essential prerequisite has not been met, because no class had been certified prior to the time petitioners' individual claims were mooted. To the contrary, the court in this case specifically denied petitioners' motion for the case to proceed as a class action (Pet. App. C 7a).

Petitioners argue, however, citing footnote 11 of the *Sosna* opinion, that in the circumstances of this case their claims were rendered moot before the district court had an opportunity to rule on their certification, and that the time

of certification should be "relate[d] back" to the filing of their initial complaint (Pet. 14). Footnote 11 in *Sosna* states (419 U.S. at 402):

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

In *Gerstein* v. *Pugh*, 420 U.S. 103, 110-111 n. 11, for example, the Court observed that the relation back doctrine might appropriately be applied to a class of pretrial detainees because pretrial custody is of a brief and uncertain duration and may terminate at any time; and thus "[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class."

But this case is quite different, as the court of appeals correctly held (Pet. App. A 4a):[4]

> [T]he issues raised by the individual plaintiffs are not "capable of repetition, yet evading review." Such a contention requires a realistic appraisal of the circumstances. *Sosna* v. *Iowa*, 419 U.S. 393, and see

[4]There is no conflict with the court of appeals cases cited by petitioners (Pet. 14 n. 19), each of which involves circumstances where the claim of any named plaintiff would likely become moot before a class could be certified. *McGill* v. *Parsons*, 532 F. 2d 484 (C.A. 5), like *Gerstein* v. *Pugh*, *supra*, involved pretrial detainees. And in *Inmates of San Diego County Jail* v. *Duffy*, 528 F. 2d 954 (C.A. 9), the court expressly found that inmates stayed in the facility in question an average of only 7.65 days. In *Zurak* v. *Regan*, 550 F. 2d 86 (C.A. 2), certiorari denied, No. 76-1564, June 27, 1977, the case was in fact certified as a class action, but not until after it had become moot. The court of appeals found that the district court had

> fn. 11 (1975). The average confinement of persons sentenced under the Youth Corrections Act is of sufficient duration that, if any of them were commingled with adult prisoners, an action could be prosecuted, and certainly a class action could be commenced and certified, before release of the named plaintiffs. This would preserve the claims against any objection based on mootness.

This case is thus a far cry from one involving a class of persons such as the pretrial detainees in *Gerstein* v. *Pugh*, *supra*, where any individual may be a member of the class for only a few days.

The mere fact that the named plaintiffs in this case were conditionally released before the court ruled upon the class certification—indeed before the respondents filed their opposition to class certification—does not establish that the claim is inherently one that will become moot "before the district court can reasonably be expected to rule on a certification motion." This fact affords no basis for finding that the claim is one that will "evade review" unless certification is viewed as relating back.

Moreover, petitioners' repeated suggestion (Pet. 6-7, 12, 14) that respondents granted their conditional releases

unaccountably delayed for almost a year in ruling on the certification motion and also noted that because "of the relatively short periods of incarceration involved" (the usual sentence was for no longer than one year) "and the possibility of conditional release" (which could be applied for after only 60 days' incarceration) "there was a significant possibility that any single named plaintiff would be released prior to certification." 550 F. 2d at 91-92. Finally, in *Frost* v. *Weinberger*, 515 F. 2d 57 (C.A. 2), certiorari denied *sub nom. Frost* v. *Mathews*, 424 U.S. 958, plaintiffs claimed that a hearing was required before reduction of social security benefits; since a hearing was given after reduction, the question of the right of a pre-reduction hearing would again likely have become moot as to any named plaintiff before the class action issue could be determined.

in order to moot their claims and thus avoid judicial resolution, and that they will do so again in future cases, is disingenuous and unsupported by the record. The releases in this case resulted from negotiations conducted under the guidance of the district court between petitioners' own counsel and counsel for the government parties.[5]

3. Finally, the facts of this case make it a particularly unsuitable one in which to permit a class suit to continue despite the fact that the claims of the named plaintiffs have become moot even before certification. Petitioners here have not established that they could have adequately represented the class they described even if their individual claims had not become moot at the time of their releases. Although they sought to represent all females "who are now or will be sentenced under the Federal Youth Corrections Act and committed for treatment to the custody of" the Attorney General and the Director of the Bureau of Prisons, petitioners' complaint was based in

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[5]In fact, when the proposed conversion of the youth center to an all-male institution was first announced to the female inmates, the latter were informed that wholesale transfers to other institutions were not contemplated, but rather that conversion would be achieved primarily through attrition as female inmates completed their sentences or achieved conditional release. In the case of transfers, moreover, every effort would be made to place the inmate at the institution of her choice (J.A. 105-112). The facts regarding the release of each of the petitioners, are discussed *supra* at. p. 3.

The record amply supports the court of appeals' conclusion (Pet. App. A 3a) that the government acted in "good faith" in releasing petitioners. Moreover, petitioners' contention that their conditional releases were intended to moot their suit is irrelevant, since they obtained the relief for which they sued, preventing their transfer from the Kennedy Youth Center to an institution housing adults. Conditional release more than achieved this limited objective.

large measure on the specific facts regarding their objections to the conversion of the Kennedy Youth Center to an all-male institution.

The class petitioners seek to represent, in contrast, includes female youth offenders whose circumstances vary widely, including some who are presently assigned to adult facilities and who may have formed satisfactory educational and community ties to those institutions; females who have not yet been sentenced and have formed no ties to any correctional institution; and females who are being held at state facilities, halfway houses or have achieved conditional release. Clearly petitioners' particularized complaint has not demonstrated that they can represent the myriad interests of all those in this large category, and indeed now that petitioners have been conditionally released they have little in common with the class. Nevertheless, petitioners seek the right to litigate broad and abstract questions of public and administrative policy in which they have little or no personal stake. Class suit certification is not available for such a purpose. See *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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